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To: Chair of Committee of Government Representatives on Civil Society Representatives
From: Friends of the Earth US
Re: Comments on Investment Negotiating Group of Free Trade Area of the Americas (FTAA)

1. EXECUTIVE SUMMARY

Friends of the Earth welcomes this opportunity to provide comments on the nine negotiating groups conducting negotiations for a Free Trade Area of the Americas. Due to our interest in the impacts of foreign investment on sustainable development our comments will focus on the investment negotiating group. However our interest in FTAA negotiations are broader than the investment issue. We consider the model laid out by the mandate of the FTAA negotiating group to be the wrong, approach to hemispheric integration. Any attempt to duplicate the provisions of the North American Free Trade Agreement on a regional level will be opposed by the majority of the public.

(Any questions on this submission should be directed to: Mark Vallianatos, International Policy Analyst, tel: 202-783-7400 x23 1, e-mail: myallianatos@ foe.org)

INVESTMENT LIBERALIZATION AND THE ENVIRONMENT
Economic liberalization has already produced significant environmental impacts in the American continent. Extensive privatization programs, market deregulation and economic and regulatory incentives for investments have in some cases left trails of ecological destruction. The "Maquilladora" area along the US-Mexican border offers an egregious example of the environmental disaster created by deregulated free trade zones.

A recent boom of foreign investment inextractive industries in Latin America poses new threats to some of the richest biodiversity areas in the planet. Annual timber production in Latin America increased by 20 percent between 1990 and 1996, with export of timber products growing by 120 percent. Recent discoveries of large oil and gas reserves in the tropical Andes are a prelude to intensive exploitation. Concessions have already been indiscriminately awarded in critical areas, such as around the Manu National Park in Peru and in parts of the Madidi National Park in Bolivia.

Unfortunately, extractive industries operating in Latin America have a particularly negative record. Oil companies in Ecuador spilled an estimated 19 billion gallons of toxic waste between 1972 and 1989, while 17 million gallons of oil spilled along the Trans-Ecuadorian pipeline. Most of the companies involved in timber operations in Latin America are owned by Pacific Rim-based multinationals which have been responsible for massive destruction of forests in South East Asia.

The unregulated market integration approach proposed under the FTAA process would not improve this critical situation-and could make it worse. To implement effective environmental and conservation policies, countries need to be able to screen foreign investment. This is the only way to promote environmentally sound projects and prevent companies with questionable records from expanding their activities.

The approach taken to date in US bilateral investment agreements (BITs) in the Western Hemisphere and in Chapter I I of the North American Free Trade Agreement (NAFTA) raises serious concerns on the US negotiating position on FTAA investment rules. A continuation of past investment policies would grant excessive power to foreign investors, skewing national and international law against the rights and interests of citizens on the one hand, and in favor of corporations on the other. The NAFTA/ BIT model, which combines extensive privileges for foreign investors with investor to state dispute resolution, could impede regulatory flexibility, preventing governments from freely pursuing a number of important economic, environmental and social policies. Finally, we are concerned that nothing in this kind of agreement ensures that investors operate responsibly.

As we approach the next millennium, the interplay between investment and economically and environmentally sustainable development, social equity, and financial stability are increasingly clear. International economic agreements and institutions must reflect the concerns of the public and bear the stamp of the democratic governments which negotiate on their citizens' behalf. We will judge government positions by these standards. **If FTAA investment negotiations unfold along the lines of NAFTA and the proposed Multilateral Agreement on Investment (MAI), the majority of our engagement with FTAA negotiations will consist of awareness raising in the United States and throughout the Hemisphere to position civil society to oppose the entire FTAA process.**

The body of these comments examines potential components of an FTAA investment agreement and identifies areas of concern through analysis of the potential implications of these provisions. Where appropriate, suggestions for changes are included. Some major problems uncovered by our review of the likely FTAA investment model I are:

I Throughout this comment we will use the term "current model" to refer to the approach to international investment agreements reflected in US BITs,.the NAFTA investment chapter, and the proposed MAI. Another indicator of possible FTAA investment rules are the recommendations given to governments by the Business Fora of the Americas - lateral events to official Ministerial meetings held by the business sector. Ministers of Trade have formally acknowledged contributions and recommendations coming out of the Business Fora held every year from 1995 to 1998. Given the political influence of large corporations in the shaping of trade and investment policy, Business Fora recommendations are helpful to understand which investment rules are likely to be adopted during FTAA negotiations.

1. **The recent settlement of Ethyl Corporation's NAFTA suit against the Government of Canada demonstrates the dangers of investor-to-state dispute resolution**

The current model's investor to state dispute resolution rules grant excessive power to foreign investors, expose governments to potentially large monetary awards, and do nothing to open dispute resolution processes to public scrutiny and participation. Allowing investors to initiate binding investor to state challenges before international arbitral panels inappropriately "privatizes" international dispute settlement. With diplomatic checks removed, governments could face suits over any policies which investors believe violate the current model, potentially for large monetary damages. International arbitral panels are closed to the public and are therefore not acceptable forums for addressing complaints aimed at democratically enacted laws. The FTAA dispute rules:

- Should not allow investor to state dispute resolution
- State to state dispute proceeding should be conducted in a transparent manner, with opportunities for public input and oversight

2. **The combination of the current model's broad definition of investment and rules on "free" financial transfers protects short-term, potentially destabilizing financial flows**

Recent economic trends in East Asia have highlighted the role played by short-term capital inflows and outflows in contributing to financial instability. There is currently a wide-ranging discussion among policy makers and economists on the usefulness of capital controls and other precautionary measures. It is therefore troubling that the draft current model creates a broad right of foreign participation in portfolio investment and related financial transfers. Investment is broadly defined under the current model to include stocks and bonds, as well as contract rights underlying other forms of financial flows. Under the national treatment principle governments that allow citizens to trade in these assets must also allow foreign investors to buy and sell. The agreement's rules on financial transfers would allow foreign investors to repatriate their investment without government oversight. The result would be the creation of an international legal guarantee for capital inflows and outflows.

Avoiding future economic crises will require further analysis and continued international cooperation. In the immediate context of FTAA negotiations, several policies should be adopted to discourage non-productive or speculative investment:

- The FTAA's definition of investment should exclude equity investments such as shares and stocks, c allow these to be covered at the discretion of each current model signatory.
- Other forms of speculative investment, such as currency trading and derivatives, should also be specifically excluded from the definition of investment.
- Countries' ability to adopt financial safeguards should not be limited. Governments should be able to restrict and regulate speculative foreign investment as they see fit, bound only by an obligation to not, other nations and make the rules publicly available.

3. **The current model's ban on performance requirements outlaws legitimate economic development strategies used by governments to ensure local benefits from investment**

Many governments attempt to combine policies that welcome foreign investment with measures to maximize the potential benefits of this investment to local people. By outlawing numerous categories of these performance requirements, the current model would deprive governments of legitimate economic development tools. Policies such as requiring joint ventures, local hiring, and technology transfer can help build links between multinational corporations and host communities. The FTAA:

- Should not address performance requirements or, if performance requirements are addressed, be limited to performance requirements already covered by the WTO's TRIMS agreement

4. **If the FTAA is to safeguard the environment the agreement's language on expropriation must be narrow and a truly protective environmental exception included.**

In order to ensure that the FTAA does not threaten environmental protection, governments' regulatory capacity must be guaranteed. Concerns have been raised that the current model's approach to expropriation and compensation are over-broad and could be used by investors to challenge important environmental policies. Cases brought by U.S. Corporations under the North American Free Trade Agreement demonstrate that investors are willing to exploit broad and inprecise expropriation language to seek compensation. The FTAA's expropriation provision should be written such that:

· Only direct expropriation requires compensation
· Social and environmental regulations are not expropriations

incorporating an environmental exception into the FTAA would be an initial step to providing confidence that environmental protection will not be undercut. The exception would need to be stronger than the GATT Article XX exception for health, safety and environmental measures, which has yet failed to successfully protect a single public interest regulation from challenge under WTO rules. An FTAA environmental exception could improve GATT's article XX by:

- Protecting all environmental measures "relating to" environmental protection rather than C4necessary to"
- Establishing a presumption that environmental measures do not constitute arbitrary or unjustifiable discrimination